

**COMMONWEALTH OF KENTUCKY
BOARD OF TAX APPEALS
FILE NO. K04-R-08**

DUPLICATOR SALES & SERVICE, INC.

APPELLANT

v.

ORDER NO. K-19309

**FINANCE & ADMINISTRATION CABINET,
DEPARTMENT OF REVENUE,
COMMONWEALTH OF KENTUCKY**

APPELLEE

In this matter Duplicator Sales & Service, Inc. (Duplicator) appeals from a final ruling of the Finance and Administration Cabinet (Cabinet) that the outstanding sales and use tax assessment totaling \$8, 141.22 plus applicable interest is a legitimate liability.

The parties proceeded by written stipulation, supplemented by some limited testimony, and briefs submitted by each party after the hearing date of January 12, 2005.

FINDINGS OF FACT

Upon the whole case The Board finds as follows.

Duplicator is a retailer of office equipment and supplies. Under maintenance agreements with its customers Duplicator provides toner and parts to the customer as well as servicing the equipment covered by the agreement. Parts and supplies provided to these customers are treated as “sales” by Duplicator for the purpose of calculating sales tax liability.

Duplicator also provides parts and supplies to customers who do not have

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maintenance agreements. Likewise, these parts and supplies provided to these customers are treated as “sales” by Duplicator for the purpose of calculating sales tax liability.

The Cabinet has determined that Duplicator does not engage in the “sale” of parts and supplies when it provides these items to its customers under a maintenance agreement. The Cabinet takes the position that these parts and supplies are “consumed” by Duplicator and as such are subject to “use” tax as opposed to “sales” tax. This distinction becomes important only in the limited set of circumstances where the customer receiving parts and supplies under a maintenance contract is “sales tax exempt”.

The Cabinet cites several cases for the proposition that Duplicator is in the business of supplying service rather than selling parts and supplies. *Stoner Creek Stud v. Revenue Cabinet*, 746 SW2d 73 (Ky. App 1987); *Woodward Hobson & Fulton, L.L.P. v. Revenue Cabinet*, 69 SW2d 476 (Ky. App 2002). These cases are clearly distinguishable.

In *Stoner Creek Stud v. Revenue Cabinet, Id.*, the contract in question was for a custom painting of a horse. It was determined that the payment was for the service of the artist, not the supplies used in creating the painting. Here Duplicator sells toner to its customers like an art store sells paint to an artist. Unlike the facts in *Stoner* Duplicator is not being paid to create images on paper, but for the sale of the supplies from which its customers create images on paper.

In *Woodward Hobson & Fulton, L.L.P. v Revenue Cabinet, Id.*, the Court of Appeals determined that when a law firm purchased copies of medical records it was paying for the service of copying the records and not paying for the paper itself thus the transaction was not subject to sales and use tax. Here Duplicator is selling blank paper and the toner to make the copies with. It is not selling the service of copying but the

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supplies by which copies are to be made.

The Cabinet argues that when Duplicator and its customers enter into a maintenance contract, Duplicator is obligated to provide service in addition to providing parts and supplies and that therefore Duplicator itself consumes the parts and supplies in performing its service under the maintenance contract. But a review of maintenance contracts attached to the stipulations reveals that the cost of the contract is directly tied to the anticipated number of copies to be made by Duplicator's customer. This strongly suggests that the actual "consumption" of the parts and supplies is being made by the customer and Duplicator is just being paid for them over time. The taxable event occurs when the parts and supplies are transferred. KRS 139.120.

Upon the whole case the Board finds that the Appellant has met its burden of proof that the transfer of parts and supplies to its customers under maintenance agreements constitutes a "retail sale" within the meaning of KRS 139.100, KRS 139.200 and that these transactions specifically fall within the definition contained in KRS 139.120 in that the activities as described in the evidence results in "the transfer of ...possession...conditional or otherwise...by any means whatsoever, of tangible personal property for consideration."

CONCLUSION OF LAW JUDGMENT AND FINAL ORDER

Upon the whole case the Board concludes that the transfer of possession of tangible personal property by Duplicator to its customers under maintenance agreements as described in the evidence constitute "retail sales".

The Board further concludes that to the extent that the Cabinet's final ruling No.

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2004-18 dated June 2, 2004 affirmed the assessment of sales and/or use tax for transactions with customers of Duplicator who were “sales tax exempt”, that ruling is hereby reversed.

This is a final and appealable order. All final orders of this agency shall be subject to judicial review in accordance with the provisions of KRS Chapter 13B. A party shall institute an appeal by filing a petition in the Circuit Court of venue, as provided in the agency’s enabling statutes, within thirty (30) days after the final order of the agency is mailed or delivered by personal service. If venue for appeal is not stated in the enabling statutes, a party may appeal to Franklin Circuit Court or the Circuit Court of the county in which the appealing party resides or operates a place of business. Copies of the petition shall be served by the petitioner upon the agency and all parties of record. The petition shall include the names and addresses of all parties to the proceeding and the agency involved, and a statement of the grounds on which the review is requested. The petition shall be accompanied by a copy of the final order.

A party may file a petition for judicial review only after the party has exhausted all administrative remedies available within the agency whose action is being challenged, and within any other agency authorized to exercise administrative review.

A petition for judicial review shall not automatically stay a final order pending the outcome of the review, unless:

- (a) An automatic stay is provided by statute upon appeal or at any point in the administrative proceedings;
- (b) A stay is permitted by the agency and granted upon request; or
- (c) A stay is ordered by the Circuit Court of jurisdiction upon petition.

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Within twenty (20) days after service of the petition of appeal, or within further time allowed by the Circuit Court, the Kentucky Board of Tax Appeals shall transmit to the reviewing court the original or a certified copy of the official record of the proceeding under review in compliance with KRS 13B.140(3).

DATE OF ORDER

AND MAILING: May 13, 2005

FULL BOARD CONCURRING

**NANCY MITCHELL
CHAIR**